IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-470

CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL UNION NO. 391, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner

vs.

PILOT FREIGHT CARRIERS, INC.,
and
NATIONAL LABOR RELATIONS BOARD,

Respondents

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR PILOT FREIGHT CARRIERS, INC. IN OPPOSITION TO PETITION

WHITEFORD S. BLAKENEY
J. W. ALEXANDER, JR.
JOHN O. POLLARD
Charlotte, North Carolina 28280

Of Counsel:
BLAKENEY, ALEXANDER & MACHEN
3450 NCNB Plaza
Charlotte, North Carolina 28280

TABLE OF CONTENTS

CITATIONS

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-470

CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL UNION NO. 391, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner

vs.

PILOT FREIGHT CARRIERS, INC.,
and
NATIONAL LABOR RELATIONS BOARD,
Respondents

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR PILOT FREIGHT CARRIERS, INC. IN OPPOSITION TO PETITION

REASONS WHY A WRIT OF CERTIORARI SHOULD NOT BE ISSUED IN THIS CASE

This is but another in a series of cases growing out of the continuing effort of those—primarily the Teamsters Union—who would have the provisions of the National Labor Relations Act extended, by Labor

Board fiat, to a class of persons—namely, motor carrier dispatchers—regardless of what duties or authorities they may have with respect to other employees. See, *National Labor Relations Board v. Metropolitan Petroleum Co.*, 506 F. 2d 616 (1st Cir. 1974); *National Labor Relations Board v. Gray Line Tours, Inc.*, 461 F. 2d 763, 764 (9th Cir. 1972); *Pacific Intermountain Express Co. v. National Labor Relations Board*, 412 F. 2d 1, 2-4 (10th Cir. 1969); *Eastern Greyhound Lines v. National Labor Relations Board*, 337 F. 2d 84 (6th Cir. 1964).

In each of these cases, the Courts of Appeals rejected findings of the National Labor Relations Board to the effect that the dispatchers were "employees" rather than supervisors.

In the instant case, as in the others, the Board's inquiry necessarily was factual. That is, the Board was required to examine the duties and responsibilities of the dispatchers to determine whether they possessed any of the statutory authorities which would accord them the status of supervisors within the meaning of the National Labor Relations Act.[1]

---

[1]Section 2(11) of the Act defines the term "supervisor" as:

"[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

It is well settled that Section 2(11) must be read in the disjunctive. That is, if the Board's Administrative Law Judge in this case had found that the dispatchers possessed only one of the powers described in the statutory list, he would have been absolutely bound to rule that they were supervisors and not covered by the Act. See, *e.g., James H. Matthews & Co. v. National Labor Relations Board*, 354 F. 2d 432, 434 (8th Cir. 1966). Here the Administrative Law Judge actually found much more than that. On the basis of conclusive proof[1], he found that these dispatchers possessed, and regularly exercised through the use of independent judgment, *numerous* of the requisite powers and authorities (50a-61a, 66a-72a, 73a-76a). Thus, by statutory definition, they were supervisors[2] and no further inquiry, conclusion or inference was necessary or permissible.

Upon appeal, a three-member panel of the Board found no material conflict in the evidence, thereby establishing the validity of the Administrative Law Judge's factual determinations. Nevertheless, the Board reversed the Administrative Law Judge by ignoring on a wholesale basis the evidence upon which he had relied and which compelled the ruling he made. Instead the Board focused its attention upon bits and pieces of other evidence in the record from

---

[1]The petitioner admits that there is no material dispute about the accuracy of the fact finding (Petition, pp. 3, 9).

[2]Thus characterized, the dispatchers are excluded from the provisions of the National Labor Relations Act by §2(3) of the Act.

which it claimed to be persuaded that the dispatchers, although undisputedly possessing the requisite authorities, did not utilize independent judgment in exercising them (22a-26a).

When confronted with this decisional sleight of hand, the Court of Appeals first set out the standard by which it was to be guided in reviewing the Board's actions.

> "We must accept the Board's finding if it is supported by substantial evidence on the whole record, *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) even if we might have resolved the question differently. *Bayside Enterprises v. NLRB*, 45 USLW 4086, (January 11, 1977). Deference to the Board's findings is especially appropriate here because the case involves but one specific instance of the "[m]yraid forms of service relationship, with infinite and subtle variations in the terms of employment, [which] blanket the nation's economy,' and which the Board must confront on a daily basis.

Id. at 4087."[1]

The propriety of that standard in cases of this nature is well settled. Section 10(e) of the National Labor Relations Act requires reviewing courts to observe that the "findings of the Board with respect to

[1]Subsequent to the filing of the Petition, the Court of Appeals decision has been printed in the official reports. *National Labor Relations Board v. Pilot Freight Carriers, Inc.*, 558 F. 2d 205, 207-208 (4th Cir. 1977).

questions of fact, if supported by substantial evidence on the record as a whole shall be conclusive."

This Court subsequently interpreted this statutory language as follows:

> ". . . Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.
>
> . . .
>
> "Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both."
>
> *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 488, 490 (1951).

By applying this standard, the Court of Appeals concluded that the record simply would not permit any finding other than that all of Pilot's local, line-haul and central dispatchers were supervisors within the meaning of the Act.

> "But neither the General Counsel nor the Board have directed us to substantial evidence supporting the Board's decision. We have examined the lengthy transcript as well as the material submitted in the joint appendix and find no substantial evidence to rebut the testimony that indicates that the dispatchers involved here possessed supervisory authority requiring the use of independent judgment as defined by §2(11)."
>
> *National Labor Relations Board v. Pilot Freight Carriers, Inc.*, 558 F. 2d at 208.

Thus, the Court of Appeals has dealt with a federal statutory or procedural standard in a manner which, far from being in conflict with applicable decisions of this Court,[1] is unquestionably in strict accordance with such decisions.

Moreover, when a reviewing court has employed the proper standard, this Court has carefully defined the limitations imposed upon its own review of the actual application of that standard in specific cases.

> "Our power to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole

[1]See Rule 19 of the Revised Rules of The Supreme Court.

> there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. *This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied*" [emphasis added].
>
> *Universal Camera, supra,* at 490-491.

The petitioner, in reality, is seeking to have this Court discard the essential principles set forth in *Universal Camera* and in Sections 2(3), 2(11) and 10(e) of the Act. In place of this authority, the Court is being urged to resurrect and give renewed vitality to outmoded principles of the past. Thus, petitioner now asserts that the Court of Appeals erred in failing to accede to limitations upon its review of the Board's exercise of its fact-finding authority which were supposedly established by this Court more than 30 years ago.

In *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U.S. 111 (1944), the Court, after an extensive review of the pertinent facts, upheld a determination by the Board that boys who delivered newspapers were "employees" of the newspaper publisher and, as such, subject to certain statutory protections. In arriving at its decision, the Court stated that:

> ". . . [Where, as here,] the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially . . . the Board's

> determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law."
>
> 322 U.S. at 131.

The petitioner construes this language as having established a different standard of review to be applied by Courts of Appeals when they are scrutinizing Board decisions which involve what it characterizes as a "mixed determination of law and fact within the field of [the Board's] specialized expertise" (Pet., 8). Thus, the Court of Appeals erred, according to petitioner, by failing to "accept" a decision by the Board which was supposedly arrived at through the application of its special "expertise". That is, the Board's determination that Pilot's dispatchers legally were "employees" rather than "supervisors" was subject to very limited review by the Court of Appeals because the Board is more "expert" than the Court in making decisions of this nature.

The petitioner then extends its principle of limited review to the point where the reviewing Court must confine its examination of purely factual determinations to a single question—namely, whether there is a "rational basis" for Board decisions (Pet., 8).

What is left unsaid—but nevertheless and necessarily implicit in petitioner's argument—is the assertion that Board determinations in areas of its supposed "expertise" may never be set aside by reviewing courts because the very expertise which was presumably em-

ployed in arriving at them renders them unassailable by any body not possessing the same degree of "expertness". Thus, under petitioner's argument, such factual determinations are restricted not merely to limited review—they are virtually *immune* from review.

The absurdity of such a claim, particularly in light of the congressional and judicial authority set out above, is so patently obvious as to merit little, if any, further discussion. It is perhaps worthwhile, however, to point out that the petitioner's claimed legal authority for its incredible proposition was superseded long ago in all pertinent respects.

Even if the language in *Hearst Publications* could be construed as establishing the principle of non-review claimed by the petitioner, it must be remembered that the "Act" referred to in that case was the original National Labor Relations Act—known as the "Wagner" Act. And the "broad statutory term" referred to read simply as follows:

> "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic

service of any family or person at his home, or any individual employed by his parent or spouse."

National Labor Relations Act
(Wagner Act), Section 2(3),
29 U.S.C. §152(3).

Three years after the *Hearst* decision was issued, Congress, expressing its concern with the way the Board had interpreted this broad statutory definition of "employee" to extend coverage of the Act to classes of persons beyond those intended, amended the Act to make clear that certain of these classes were to be excluded.

"The term 'employee' . . . shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of *an independent contractor, or any individual employed as a supervisor* . . ."[1] [emphasis added].

Labor Management Relations Act
(Taft-Hartley Act), Section 2(3),
29 U.S.C. §152(3).

This, in effect, overruled *Hearst Publications*.

[1]While *Hearst Publications* dealt with the question of whether the newsboys were independent contractors (rather than whether they were supervisors), the distinction is not a material one here because, as emphasized, both independent contractors and supervisors were specifically excluded in the Taft-Hartley Amendments. And the latter were excluded in response to decisions similar to *Hearst Publications* which had extended coverage of the Wagner Act to foremen. See *National Labor Relations Board v. Bell Aerospace Co.*, 416 U.S. 267, 277-278 (1974).

That fact was succinctly noted in a recent decision by the Court of Appeals for the Second Circuit. In *Lorenz Schneider Co., Inc. v. National Labor Relations Board*, 517 F. 2d 445 (2nd Cir. 1975), the Board had argued to the Court of Appeals essentially what the petitioner has asserted here—namely, that a Board determination of "employee" status is an unassailable exercise of its special expertise.

First, the Court framed the issue before it in these terms:

"We are again required to review one of the National Labor Relations Board's (NLRB) case-by-case determinations whether the relationship between a business enterprise and other persons is that of employer and employee or falls within the exclusion of 'any individual having the status of an independent contractor' which Congress added to §2(3) of the National Labor Relations Act (NLRA) in the Taft-Hartley Act in reaction to NLRB v. Hearst Publications, Inc., 322 U.S. 111, 64 S. Ct. 851, 88 L. Ed. 1170 (1944). See NLRB v. United Insurance oC., 390 U.S. 254, 256, 88 S. Ct. 988, 19 L. Ed. 2d 1083 (1968)."

517 F. 2d at 446.

The Court then pointed out the utter fallacy of what is essentially the same contention now made by the Union to this Court.

"The legislative history of the Taft-Hartley Act reveals a clear desire on the part of Congress to restrain the tendency of courts, as evidenced in the

Hearst Publications decision, to bow to the supposed expertness of the Board in its assessment whether a particular group should be considered employees for purposes of §2(3) of the National Labor Relations Act, 49 Stat. 449, 450 (1935). See H.R. Rep. No. 245, 80th Cong., 1st Sess., 18 (1947), reprinted in 1 Leg. Hist. of the Labor Management Relations Act, 1947, p. 309 (1948) . . ." [emphasis added].

517 F. 2d at 416, n. 1.

CONCLUSION

Upon all of the foregoing, Pilot Freight Carriers, Inc. earnestly contends that a Writ of Certiorari should not be granted in this case.

Respectfully submitted,

WHITEFORD S. BLAKENEY
J. W. ALEXANDER, JR.
JOHN O. POLLARD
Attorneys for Pilot Freight Carriers, Inc.